

² The Board notes that, following the January 12, 2021 decision, appellant submitted additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish ratable hearing loss for schedule award purposes.

FACTUAL HISTORY

On January 30, 2020 appellant, then a 49-year-old law enforcement officer, filed an occupational disease claim (Form CA-2) alleging that he developed tinnitus due to factors of his federal employment. He noted that he first became aware of his condition and realized it was caused or aggravated by his federal employment on January 27, 2020. Appellant explained that he was exposed to hazardous noise levels over his 25 years of federal service. He did not stop work.

Appellant was treated by Dr. Kimberly Nelson, a Board-certified otolaryngologist, on January 27, 2020 who performed a comprehensive hearing examination and diagnosed tinnitus of both ears.

In a development letter dated February 12, 2020, OWCP informed appellant of the deficiencies of his claim and advised him of the type of factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion. In a separate development letter of even date, it requested that the employing establishment provide additional information regarding appellant's exposure to noise due to factors of his federal employment, including comments from a knowledgeable supervisor regarding the accuracy of his statements. OWCP afforded both parties 30 days to respond.

In response to the development letter, appellant submitted a statement dated February 14, 2020, providing a review of his employment history and noting that he began his career as a border patrol agent in April 1995 and was required to participate in firearms training on a daily basis for six to eight weeks. He was exposed to noise from magnum revolvers and 12-gauge shotguns and was provided hearing protection. From August 28, 1995 through March 27, 1998, appellant worked as a border patrol agent and was exposed to noise from freight train power units, bus engines, and air brake systems. No hearing protection was required or made available. As a border patrol agent, appellant was required to qualify with a handgun, shotgun, and automatic weapons on a quarterly basis and hearing protection was not always available for each agent. From March 28, 1998 through April 2001, he worked as a deportation officer in Denver, Colorado and was exposed to noise from quarterly qualification. Appellant was provided hearing protection. From April 2001 through October 3, 2003, he worked as a detention and deportation officer in Washington, D.C. and was exposed to noise from quarterly firearms that occurred inside an indoor shooting range. Hearing protection was provided. From October 3, 2003 through November 10, 2017, appellant worked as a supervisory detention and deportation officer and was exposed to noise from quarterly qualifications. Hearing protection was provided. On November 12, 2017 appellant worked as a deputy field office director and was exposed to noise from quarterly firearms qualifications. He indicated that he experienced slight ringing in both ears since February 1, 2010, which progressively increased in severity. Appellant continued to be exposed to high noise levels while performing his work duties. He first noticed his hearing loss on February 1, 2010 and realized it was related to his federal employment on January 27, 2020.

OWCP received additional evidence.

On February 1, 2010 Dr. Nelson treated appellant for a history of tinnitus. She diagnosed tinnitus and prescribed medication. Accompanying her report was an audiogram dated February 1, 2010, which indicated bilateral hearing within normal limits unchanged from his last evaluation in 2008. Dr. Nelson evaluated appellant on January 27, 2020 for ringing in his ears and decreased hearing. Appellant reported working in law enforcement with a history of noise exposure. Dr. Nelson diagnosed tinnitus in both ears. She reviewed an audiogram performed on her behalf on January 27, 2020, which was within normal limits, but revealed slightly decreased hearing compared to the last audiogram in 2010.

On February 14, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On March 12, 2020 the employing establishment responded to OWCP's development letter and concurred that the environment at the shooting range affected hearing, however, asserted that hearing protection was provided in the form of foam insert ear buds and hard-shell range earmuffs. The decibel and frequency level was unknown. The period of exposure was noted as occurring five days a year for eight hours a day. Appellant's last exposure to hazardous noise was January 27, 2020. OWCP received a position description for a supervisory detention and deportation officer.

On September 28, 2020 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Alan Lipkin, a Board-certified otolaryngologist serving as a second opinion physician, regarding the nature, extent, and causal relationship of his hearing loss.

In his October 20, 2020 report, Dr. Lipkin reviewed the SOAF, history of injury, and the medical evidence of record. Testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed losses at 10, 15, 10, and 5 decibels (dBs) for the right ear, respectively, and 20, 15, 15, and 10 dBs for the left ear, respectively. Dr. Lipkin noted that the ears, tympanic membranes, and canals were normal. Audiometric studies were performed and revealed hearing at the lower end, but within technical limits of normal in both ears. He diagnosed history of noise exposure, subjective tinnitus with normal hearing. Dr. Lipkin opined that it was likely that the tinnitus was at least in part due to noise exposure encountered in his federal employment.

By decision dated November 23, 2020, OWCP accepted appellant's claim for bilateral tinnitus.

On December 2, 2020 appellant filed a claim for a schedule award (Form CA-7).

On December 16, 2020 OWCP referred the medical record and SOAF to Dr. Jeffrey Israel, an OWCP district medical adviser (DMA) and Board-certified otolaryngologist, to determine the extent of appellant's hearing loss and permanent impairment due to his employment-related noise exposure. On December 17, 2020 Dr. Israel reviewed Dr. Lipkin's examination report and agreed that the October 20, 2020 audiogram revealed normal hearing in both ears with the exception of the left ear 250 Hz level at 25 dB. He opined that there was no sign of work-related hearing loss other than the beginnings of left ear 4,000 Hz acoustic notch at 20 dB, which is still normal hearing.

Dr. Israel applied the audiometric data to OWCP's standard for evaluating hearing loss under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,³ (A.M.A., *Guides*) and determined that appellant sustained a right monaural loss of zero percent, a left monaural loss of zero percent, and a binaural hearing loss of zero percent. He averaged appellant's right ear hearing levels of 10, 15, 10, and 5 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, by adding the hearing loss at those 4 levels then dividing the sum by 4, which equaled 10. After subtracting the 25 dB fence, Dr. Israel multiplied the remaining 0 balance by 1.5 to calculate zero percent right ear monaural hearing loss. He then averaged appellant's left ear hearing levels of 20, 15, 15, and 10 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, by adding the hearing loss at those four levels then dividing the sum by four, which equaled 15. After subtracting the 25 dB fence, Dr. Israel multiplied the remaining five balance by 1.5 to calculate zero percent left ear monaural hearing loss. He then calculated zero percent binaural hearing loss by multiplying the right ear loss of zero percent by five, adding the zero percent left ear loss, and dividing this sum by six. Dr. Israel opined that he concurred with Dr. Lipkin's calculations and noted that a tinnitus award of five percent could not be given as there was "no binaural hearing impairment loss." He recommended yearly audiograms and use of noise protection. Dr. Israel determined that appellant had reached maximum medical improvement (MMI) on October 20, 2020, the date of Dr. Lipkin's examination.

By decision dated January 12, 2021, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish that his accepted hearing loss condition was severe enough to be considered ratable.

LEGAL PRECEDENT

The schedule award provisions of FECA⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The sixth edition of the A.M.A., *Guides*⁶ has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.⁷

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each

³ A.M.A., *Guides* (6th ed. 2009).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Supra* note 3.

⁷ *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *see J.W.*, Docket No. 17-1339 (issued August 21, 2018).

frequency are averaged.⁸ Then, the fence of 25 dBs is deducted because, as the A.M.A., *Guides* points out, losses below 25 dBs result in no impairment in the ability to hear everyday speech under everyday conditions.⁹ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁰ The binaural loss of hearing is determined by calculating the loss in each ear using the formula for monaural loss, the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.¹¹ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹²

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a ratable hearing loss for schedule award purposes.

OWCP properly referred appellant to Dr. Lipkin for a second opinion examination to evaluate his hearing loss. In his October 20, 2020 report, Dr. Lipkin noted that audiometric studies performed revealed hearing at the lower end, but within the technical limits of normal in both ears. He diagnosed history of noise exposure and subjective tinnitus with normal hearing. Dr. Lipkin opined that it was likely that the tinnitus was at least in part due to noise exposure encountered in his federal employment.

In its November 23, 2020 decision, OWCP accepted the claim for bilateral tinnitus and informed appellant that his case had been forward to a DMA for OWCP to assess his percentage of permanent employment-related hearing loss.

On December 17, 2020 the DMA reviewed Dr. Lipkin's report and determined that appellant had zero percent monaural hearing loss in each ear. Dr. Israel related that testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses at 10, 15, 10, and 5 dBs for the right ear, respectively, and 20, 15, 15, and 10 dBs for the left ear, respectively. He averaged appellant's right ear hearing levels, which totaled 10. The decibel losses for the left ear were totaled at 60 and divided by 4 to obtain an average hearing loss of 15. After subtracting the 25 decibel fence, both the right and left ear losses were reduced to zero. When multiplied by 1.5, the resulting monaural hearing loss in each ear was zero percent. Accordingly, the Board finds that the DMA properly concluded that appellant did not have ratable permanent impairment of his hearing warranting a schedule award. Although appellant has accepted employment-related hearing loss, it is not sufficiently severe to be ratable for schedule award purposes.¹³

⁸ A.M.A., *Guides* 250.

⁹ *Id.*; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

¹⁰ *Id.*

¹¹ *Id.*

¹² *V.M.*, Docket No. 18-1800 (issued April 23, 2019).

¹³ *Id.*; *W.T.*, Docket No. 17-1723 (issued March 20, 2018); *E.D.*, Docket No. 11-0174 (issued July 26, 2011).

The Board has held that, in the absence of ratable hearing loss, a schedule award for tinnitus is not allowable pursuant to the A.M.A., *Guides*.¹⁴ Accordingly, as appellant does not have ratable hearing loss, the Board finds that he is not entitled to a schedule award for tinnitus.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a ratable hearing loss, for schedule award purposes.

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ *Id.*